No. 08-1351

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PAN AMERICAN GRAIN CO., INC.;
PAN AMERICAN GRAIN MANUFACTURING CO., INC.

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Pan American Grain Co., Inc., and Pan American Grain Manufacturing Co., Inc. (collectively "the Company") for review of an Order the National Labor Relations Board ("the Board") issued against the Company. The Board filed a cross-application to

enforce its Order. The Board's Order, which issued on December 31, 2007 and is reported at 351 NLRB No. 93, is final with respect to all parties. (D&O 1-5.)[1]

The Board issued its Order after accepting the Court's remand, which sought a further explanation as to why the Company had to bargain over layoffs that were motivated by reduced sales, but also in part by the Company's modernization program. *NLRB v. Pan American Grain Co., Inc.*, 432 F.3d 69, 74 (1st Cir. 2005) ("*Pan Am. Grain*"). Thus, the Court observed that it "did not know how multiple motives for layoffs should be analyzed." *Id.* On remand, the Board addressed both of the Company's motives, as requested. The Board explained that the Company had a duty to bargain over the layoffs because they were admittedly motivated by the Company's desire to reduce labor costs in response to a significant reduction in production and sales, and the Company had not proven that any of the layoffs were solely attributable to its modernization program. (D&O 1-3, A 42-44.)

The Board had jurisdiction over this proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which empowers the Board to prevent unfair labor practices. This Court has

[1] "A" references are to the Addendum of record excerpts attached to the Company's opening brief filed with the Court. "D&O" refers to the Board's Decision and Order on remand, contained in Addendum C. "Tr" refers to the transcript of the hearing before the administrative law judge, contained in Addendum D. "GCX" refers to exhibits introduced at the hearing by the General Counsel. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

jurisdiction, and venue is proper, under Section 10(e) of the Act (29 U.S.C. § 160(e)) because the unfair labor practices occurred in the Commonwealth of Puerto Rico, within this judicial circuit. The Company filed its petition for review on March 19, 2008. The Board filed its cross-application for enforcement on April 22. Those filings were timely because the Act places no time limitations on such filings.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its decision to lay off 15 unit employees on February 27, 2002.

STATEMENT OF THE CASE

A. The Board's Initial Decision and Order ("*Pan Am I*")

Acting upon charges filed by Congresso De Uniones Industriales De Puerto Rico ("the Union"), the Board's General Counsel issued a consolidated complaint alleging, as relevant to this proceeding, that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by implementing a layoff on February 27, 2002, without giving the Union adequate notice and a reasonable opportunity to bargain.[2] Following a hearing, a Board administrative law judge

[2] The complaint alleged other violations, but they are not at issue here. Rather, the Company did not contest the Board's findings regarding these other violations,

issued a decision finding that the Company had violated the Act as alleged. (A 3-28.) The Company filed exceptions to that finding, and to the judge's recommended remedy requiring the Company to reinstate the affected employees and make them whole for lost wages and benefits. On October 26, 2004, the Board (Members Liebman, Schaumber, and Meisberg) affirmed the judge's ruling, and adopted his recommended order as modified. (A 1-3.)

B. This Court's Decision and the Board's Action on Remand ("*Pan Am II*")

The Board applied for enforcement and the Company cross-petitioned for review of the Board's decision in *Pan Am I*. The Court found that the Board had not sufficiently explained why the Company had to bargain over a layoff decision that was motivated by reduced sales, but also in part by the Company's modernization program. *Pan Am. Grain*, 432 F.3d at 74. Specifically, the Court could not determine from the Board's decision whether it viewed modernization decisions as mandatory subjects of bargaining, which particular facts were critical to that determination, or how multiple motives for layoffs should be analyzed.

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and, accordingly, the Court summarily enforced them. *Pan Am. Grain*, 432 F.3d at 71 n.2.

Accordingly, the Court remanded the case to the Board for further proceedings consistent with its opinion. *Id.*[3]

The Board accepted the Court's remand and findings as the law of the case. (D&O 1, A 42.) The Company and the General Counsel filed statements of position with the Board. On December 31, 2007, the Board (Members Liebman, Schaumber, and Kirsanow) reaffirmed its prior finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the February 27 layoff. (*Id.*) In so finding, the Board responded to the Court's request and addressed both of the Company's motives for the layoff. Thus, the Board explained that the layoff decision was a mandatory subject of bargaining because it was admittedly prompted, in part, by a reduction in sales resulting from decreased demand for its products and a loss of production resulting from a strike. (D&O 1, 3, A 42, 44.) Moreover, the Board found that the Company failed to establish that any particular layoff was based exclusively on its modernization program. The Board stated that had the Company made such a showing, the Board would have been in a position to address this Court's question whether the Company would have to bargain over layoffs arising solely from its modernization program. (D&O 3, A 44.)

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[3] After the parties filed motions in response to this Court's decision, the Court issued a supplemental decision declining to change or clarify the remedy; however, the supplemental decision does not impact the issues in this appeal. *NLRB v. Pan American Grain Co., Inc.*, 448 F.3d 465 (2006).

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

The Company manufactures animal feed at its Amelia and Corujo facilities, and processes rice at its Arroz Rico facility. The Union has been the collective-bargaining representative of production and maintenance employees at the Amelia and Corujo facilities since 1986, and at the Arroz Rico facility since 1992 or 1993. (D&O 1, A 42.) The last collective-bargaining agreement covering unit employees at the Amelia and Corujo facilities expired on November 21, 2000, and the one at the Arroz Rico facility expired on March 4, 2002. (A 4; Tr 409-10.)

Beginning in 1996, the Company began a modernization project at some of its facilities. As the modernization project proceeded, the Company's staffing needs gradually declined. As a result of this project, the Company laid off one or two unit employees each year from 1996-2002. (D&O 1, A 42; Tr 413.)

On January 8, 2002, unit employees at the Amelia and Corujo facilities began a strike. (D&O 1, A 42; Tr 453.) With the onset of the strike, the Company experienced a decrease in sales and production. (D&O 2, A 43; Tr 415, 491.) On February 27, in the midst of the strike, the Company notified the Union that the Company had decided to lay off 15 of the striking employees. (D&O 1-2, A 42-43; Tr 415-16, 493, GCX 33, 34.)

The Company's decision to lay off the 15 employees on February 27 was based on the Company's reduced need for staffing at that time. By a letter dated that same day, the Company told the Union the layoff was "[d]ue to economic reasons and as a result of a substantial decrease in production and sales . . . ." The Company's letter provided no other explanation for the layoff, and it made no mention of the Company's modernization program. (D&O 2, A 43; Tr 415-16, 492, GCX 33, 34.)

Company President Jose Gonzalez gave varying accounts as to whether the Company's February 27 letter stated the complete reason for the layoff. He initially testified that the letter presented the Union with a "detailed explanation" for the layoff. (D&O 2, A 43; Tr 415.) Later, he claimed that same letter did not state the "complete reason" for the layoff. He then cited the Company's modernization as an additional basis for the layoff. (D&O 2, A 43; Tr 491-93.)[4] Even so, he agreed that sales were substantially lower in January and February 2002—which coincided with the onset of the strike—than the levels that were originally budgeted for by the Company, and that the Company's reduced level of sales caused it to require a lower work force. (D&O 2 & n.7, A 43; Tr 415, 491.)

[4] In addition, Gonzalez asserted that the layoffs were based on yet another motivation—a desire to ensure that the employees would receive food stamps. (Tr 415-16, 434-35.)

He therefore agreed that the reduction in sales was a factor in the layoff decision. (*Id.*)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Members Liebman, Schaumber, and Kirsanow) reaffirmed its prior finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the February 27 layoff. (D&O 1, 3, A 42, 44.) In so doing, the Board answered the Court's question as to how to analyze layoffs resulting from multiple motives, like the ones here. Thus, the Board explained that the layoff decision was a mandatory subject of bargaining because it was admittedly prompted, in part, by a reduction in sales resulting from decreased demand for its products and a loss of production resulting from a strike. (D&O 3, A 44.) Moreover, the Board found that the Company failed to establish that any particular layoff was based exclusively on its modernization program. The Board stated that had the Company made such a showing, the Board would have been in a position to address this Court's question whether the Company would have to bargain over layoffs arising solely from modernization. (*Id.*)

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). (D&O 4, A 45.) Affirmatively, the Order requires

the Company to, on request, bargain with the Union concerning the decision to lay off employees on February 27, 2002, and the effects of that decision; and to reinstate the employees laid off on February 27, 2002, and make them whole for any loss of pay and other employment benefits suffered as a result of the Company's unlawful conduct. (*Id.*)

SUMMARY OF ARGUMENT

On remand, the Board fully answered this Court's question as to how multiple motives for layoffs should be analyzed. It reasonably explained that the Company was obligated to bargain over the layoff here because it was admittedly motivated by a decrease in sales resulting from a strike, and because the Company failed to establish that its decision to lay off any particular employee was based solely on its modernization program. The Board's finding is reasonably defensible and must, therefore, be affirmed. It is settled that economically motivated layoffs are amenable to bargaining, and that this rule applies to dual-motive layoffs that have an economic component. This is particularly true where, as here, the Board reasonably found that the economic motive was distinct from modernization. Moreover, in these circumstances, precedent supports placing the burden on the Company to prove that particular layoffs were caused solely by modernization.

Contrary to the Company, the Board fully complied with the Court's remand instructions. The Company asserts that the Board failed to consider its

motives for the layoff, but this claim simply ignores the Board's detailed consideration of those motives. Nor did the Board place an undue burden on the Company's decision to modernize. To the contrary, the Board did not order the Company to bargain over its modernization program or any layoffs solely attributable to that program, but only its decision to lay off employees based in part in economic reasons, which were distinct from its modernization.

Likewise, there is no basis to the Company's assertion that the Board had to apply a "modified" version of the test that it developed for relocation decisions in *Dubuque Packing Company*, 303 NLRB 386 (1991), *enforced sub nom, UFCW Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993). The Company never urged the Board to modify that test, and the Court is therefore barred from considering that claim now. In any event, the Board was not required to modify and apply that test and, even if it were, that test would support finding a duty to bargain in the circumstances of this case.

The Company is also wrong in suggesting that the administrative law judge found that modernization was the "main" reason for the layoffs. In fact, the judge made no such finding. Yet, the Company builds on this error in claiming that the Supreme Court's decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), compels the Board to find that the Company had no duty to bargain

here. And, as we show below, the Company's reliance on that decision is otherwise misplaced.

Finally, the Board properly ordered reinstatement and back pay because that is the customary remedy for unilaterally implementing a layoff decision. The Company's concerns over how that remedy will be applied are properly addressed in a Board compliance proceeding.

ARGUMENT

ON REMAND, THE BOARD REASONABLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY IMPLEMENTING THE FEBRUARY 27 LAYOFF

A. Applicable Principles and Standard of Review

1. An employer must bargain over layoffs that are motivated in part by labor costs

Under Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)), an employer commits an unfair labor practice by "refus[ing] to bargain collectively with the representatives of his employees."[5] Section 8(d) of the Act defines "the duty to bargain collectively" as "the performance of the mutual obligation of the employer and [the union] to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C.

[5] An employer who violates Section 8(a)(5) also commits a "derivative" violation of Section 8(a)(1), which makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise" of their rights under the Act. 29 U.S.C. § 158(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

§ 158(d); *see Pan Am. Grain*, 432 F.2d at 71. Bargaining is mandatory with respect to subjects that fall within the statutory language, *NLRB v. Wooster Div. of Borg-Warner*, 356 U.S. 342, 349 (1958), and an employer violates the Act by altering a mandatory term or condition of employment without giving the union adequate notice and an opportunity to bargain. *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S. 736, 743-48 (1962).

The Board and the courts have long held that economically motivated layoffs are mandatory subjects of bargaining. *Adair Standish Corp.*, 292 NLRB 890, n.1 (1989), *enforced in relevant part*, 912 F.2d 854 (6th Cir. 1990) (finding unlawful failure to bargain over economically motivated layoffs**)**; *Garment Workers Local 512 v. NLRB (Felbro, Inc.)*, 795 F.2d 705, 711 (9th Cir. 1986) (employer must bargain with union over economic layoff). *See also NLRB v. Westinghouse Broadcasting & Cable, Inc.*, 489 F.2d 15, 22-23 (1st Cir. 1988); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1084 (1st Cir. 1981). There are good reasons for this rule. As the Supreme Court has explained, measures aimed at reducing labor costs, such as layoffs, are "particularly suitable for resolution within the collective bargaining framework." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 210-14 (1964). Naturally, a union is uniquely positioned to offer concessions regarding employee wages and benefits to help resolve the employer's labor-cost concerns without resorting to layoffs. *See*

Fibreboard, 379 U.S. at 210-14; *Westinghouse Broadcasting*, 489 F.2d at 23. Thus, "industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of conflicting interests" that turn on labor costs. *Fibreboard*, 379 U.S. at 210-14.

The resulting principle–that layoffs motivated by labor costs are amenable to bargaining–does not disappear merely because the employer had an additional motive. Rather, the Board and the courts have held, in circumstances similar to those presented here, that an employer must bargain over mixed-motive layoffs that are based in part on labor costs. *See, e.g., The Winchell Co.*, 315 NLRB 526, 526, 527-36 (1994), *enforced mem.*, 74 F.3d 1227 (3rd Cir. 1995) (employer required to bargain over layoff decision motivated by business downturn and installation of new technology); *Vico Products Co., Inc. v. NLRB*, 333 F.3d 198, 206-07 (D.C. Cir. 2003) (employer obligated to bargain over relocation and layoff motivated by labor costs and, in part, by reconfiguration of production process). Further, these cases hold that where the employer's economic reason for the layoff is separable from any change in the scope of its operations, that layoff is a mandatory subject of bargaining. *See, e.g., Winchell Co.*, 315 NLRB at 526 (requiring bargaining over decision that turned on labor costs rather than change in scope of operations); *Vico Products*, 333 F.3d at 206-07 (D.C. Cir. 2003) (same); *accord Fibreboard*, 379 U.S. at 210-14.

Moreover, where the General Counsel proves that the employer made unilateral changes to the terms and conditions of employment, the burden is on the employer to prove an exemption from the duty to bargain. *See Fresno Bee*, 339 NLRB 1214, 1214 (1993) (employer must prove exemption to duty to bargain); *accord Van Dorn Plastic Machinery Co. v. NLRB*, 881 F.2d 302, 308 (6th Cir. 1989) ("It is an accepted proposition of law that the burden of proof on matters which relate to justification for the employer's actions rest with the employer.")

2. Neither this Court's remand nor *First National Maintenance* prescribe a particular formula for determining whether the instant layoffs are mandatory subjects of bargaining

As discussed above, the Court instructed the Board to explain "how multiple motives for layoffs should be analyzed." In framing that issue, the Court discussed *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) ("*FNM*"), in which the Supreme Court laid out the standard for determining when an employer must bargain over a decision to close part of its operations. This Court noted that, pursuant to *FNM*, there are some decisions as to which an employer must bargain with the Union, e.g., wages and "the order of succession of layoffs"; others as to which it normally need not bargain, "such as the choice of advertising," which has only an indirect impact on the employment relationship; and yet others entailing obligations that fall somewhere in between. *Pan Am. Grain*, 432 F.3d at 71 (citing *FNM*, 452 U.S. at 676-78). As to this "in between" category, *FNM* instructs that

when such decisions are amenable to resolution through the bargaining process and resort to that process will not unduly burden the enterprise, they are mandatory subjects of bargaining. *Id.*

As this Court also noted, however, *FNM* stopped short of dictating a particular analysis for the instant case. Thus, the Court observed that the dual-motive layoffs here "may or may not" fall within *FNM's* "in between" category, and that "where the line should be drawn is far from clear." *Id.* at 74. Moreover, the Court stated that *FNM* "seemingly left open" the issue of whether layoffs prompted by modernization are mandatory subjects. *Id.* Accordingly, the Court did not prescribe a particular analysis for answering its question as to "how multiple motives for layoffs should be analyzed." *Id. Cf. Van Dorn Plastic*, 881 F.2d at 304 (where the court specifically ordered the Board to place the employer's decision in a particular *FNM* category).[6]

3. The standard of review: the Board's determination whether the Company had a statutory duty to bargain must be affirmed if it is "reasonably defensible"

"Congress has made a conscious decision" in Section 8(d) of the Act (29 U.S.C. § 158(d)) to delegate to the Board "the primary responsibility of marking out the scope . . . of the statutory duty to bargain." *Ford Motor Co. v. NLRB*, 441

[6] Thus, the Court did not, as the Company suggests (Br 14, 20), issue a "specific mandate" that leaves the Board no room for interpretation.

U.S. 488, 496 (1979). Accordingly, the Board's determination as to whether or not the employer had a statutory duty to bargain must be affirmed if it "is reasonably defensible." *Id.* at 497. The factual findings underlying the Board's determination are conclusive if supported by substantial evidence on the record. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 478 (1951).

B. The Board Reasonably Found that the Company Had a Duty to Bargain Over a Layoff Decision that was Admittedly Based in Part on a Mandatory Bargaining Subject, Namely, a Desire to Reduce Labor Costs In Response to a Decrease in Production and Sales

On remand, the Board fully answered this Court's question as to "how multiple motives for layoffs should be analyzed," and reasonably explained why the Company had to bargain over a layoff decision that was motivated by a decrease in sales, and, in part, by its ongoing modernization efforts. As discussed more fully below, the Board explained that the Company had a duty to bargain over the layoff decision because it was admittedly based, in part, on "economic reasons," *and* because the Company failed to establish that its decision to lay off any particular employee was based solely on its modernization program. (D&O 3, A 44.) The Board also explained that the Company's economic reasons for the layoff were separable from its modernization program. (*Id.*) As we now explain, the Board's decision is well-supported by precedent finding a duty to bargain in similar circumstances, and by the record evidence.

First, the Board followed settled law when it required the Company to bargain over layoffs that, in the Company's own words, were due in part to "economic reasons" and "a substantial decrease in production and sales" that coincided with the onset of the Union's strike. (D&O 2, A 43; Tr 415, 492, GCX 33-34.) It is settled that economically motivated layoffs, including those due to a loss of sales, are mandatory subjects of bargaining. *See* cases cited above at pp. 12-13. This is so, the Supreme Court has explained, because industrial experience shows that measures aimed at reducing labor costs, like the layoffs here, are "particularly suitable" for resolution through collective bargaining. *Fibreboard*, 379 U.S. at 210-14; *accord Westinghouse Broadcasting*, 489 F.2d at 23.

This fundamental principle applies even when the employer has an additional motive. Accordingly, the Board and the courts have held, in circumstances similar to those presented here, that employers must bargain over multiple-motive layoff decisions that have an economic component. Thus, for example, an employer was required to bargain over a layoff decision and its effects, where, like here, the employer initially informed employees they were laid off due to a "business downturn," but then contended at trial that the layoffs were driven by its decision to install new technology. *The Winchell Co.*, 315 NLRB 526, 526-36 (1994), *enforced mem.*, 74 F.3d 1227 (3rd Cir. 1995); *see also Vico Products Co., Inc. v. NLRB*, 333 F.3d 198, 206-07 (D.C. Cir. 2003) (requiring

employer to bargain over economically motivated layoffs that were also in part due to a reconfiguration of the employer's production process).

As the foregoing shows, the Board reasonably concluded that, so long as the multiple-motive layoff has a labor-cost component, the layoff remains amenable to bargaining. Not only is it settled that a layoff induced by a drop in sales is amenable to resolution through the collective-bargaining process, *see Kajima Engineering & Construction, Inc.*, 331 NLRB 1604, 1619-20 (2000), but it is particularly true here given that the loss of sales was brought on by a strike called by the Union. Thus, the Union could have offered the Company some relief by ending the strike or making concessions regarding employee wages and hours to help the Company resolve its labor-cost concerns without resorting to layoffs. *See Westinghouse Broadcasting*, 489 F.2d at 23 (applying these factors in finding that employer had a duty to bargain).

The Board also specifically accounted for the Company's claim that the layoff was driven by its modernization program. As the Board explained, the economic (or lost sales) component of the layoff decision was separable from any change in the scope of its operations that may have resulted from its modernization efforts. (D&O 3, A 44; Tr 415, 492-93, GCX 33-34.) Specifically, Company President Gonzalez credibly testified that the Company's letter to the Union, which stated that the layoffs were due to "economic reasons" and a "substantial decrease

in production and sales," did not set forth the "complete reason" for the layoffs, and that modernization was an additional reason. (D&O 3, A 44; Tr 492-93, GCX 33-34.) As the Company acknowledges,[7] the Board reasonably viewed this testimony as indicating that the "economic reasons" cited in the letter were "distinct and separate" from its ongoing modernization effort. (D&O 3, A 44; Tr 492-93, GCX 33-34.)

Based on the foregoing facts and law, the Board reasonably found that the Company had a duty to bargain over the layoff decision to the extent that it was motivated by a desire to reduce labor costs in response to a substantial decrease in sales. Moreover, recognizing the Company's other motive, the Board noted that the Company failed to prove that its decision to lay off any specific employee on February 27 was based exclusively on modernization. The Board observed that if the Company made such a showing, then the Board would have been in a position to address the Court's question whether the Company had a duty to bargain over layoffs arising solely from its modernization program. Accordingly, the Board reasonably assumed that all of the layoffs were motivated at least in part by reasons other than efficiency gains resulting from modernization. (D&O 3, A 44.)

[7] The Company "acknowledges that the 'economic reasons' were a different consideration that caused the layoff decision," i.e., they were "in addition to" the modernization program. (Br 30.)

Not only is the Board's decision supported by the caselaw discussed above, it also follows established rules for the burden of proof in duty-to-bargain cases. Thus, it is settled that where the General Counsel proves that the employer made unilateral changes to the terms and conditions of employment (here, by laying off the employees), the burden is on the employer to prove an exemption from the duty to bargain. *See Fresno Bee*, 339 NLRB 1214, 1214 (1993) (employer must prove exemption to duty to bargain). Likewise, it is "an accepted proposition of law that the burden of proof on matters which relate to justification for the employer's actions rest with the employer." *Van Dorn Plastic Machinery Co. v. NLRB*, 881 F.2d 302, 308 (6th Cir. 1989).

Moreover, the approach that the Board adopted here carefully avoids placing any undue burden on the Company's right to shape the direction of its enterprise. The Board did not order the Company to bargain with the Union over its modernization program or layoffs solely attributable to that program, but only its decision to lay off employees based in part on economic reasons, which reasons, the record showed, were distinct from modernization.

C. The Company's Arguments are Without Merit

In this section, we address the Company's main challenges to the Board's finding that the February 27 layoff decision was a mandatory subject of bargaining. First, we explain that the Company's view–that the Board failed to fully consider

the Company's motives for the layoffs and thereby failed to provide the analysis requested by the Court–simply ignores the Board's detailed consideration of those motives. Second, we show that there is no basis to the Company's suggestion that the Board erred in not applying a "modified" version of the test that it developed for relocation decisions. The Company never urged the Board to modify that test, and, in any event, the Board was not required to do so here. Third, we explain that the Company is wrong in suggesting that the administrative law judge found that the layoff was "mainly" driven by modernization and that the Board ignored or altered this finding. Rather, the judge made no such finding and the Board's decision is consistent with the findings the judge actually made. The Company's error is notable because it builds on this misconception to develop its proposed application of *FNM* to the facts of this case. Finally, we explain that the Board properly ordered reinstatement and back pay because that is the customary remedy for unilaterally implementing a layoff decision.

1. The Board complied with the Court's remand instructions

Much of the Company's brief boils down to its erroneous contention (Br 20) that the Board "failed to encounter the gist of the remand order." The Company is clearly mistaken.

The Court asked the Board to explain "how multiple motives for layoff should be analyzed," and noted that "possibly, the Board attributed importance to

the fact that the layoffs owed something to the loss of business due to the strike." *Pan Am. Grain*, 432 F.3d at 74. On remand, the Board directly answered the Court's question, explaining that the layoff decision was a mandatory subject of bargaining because it was driven, in part, by a loss of business due to the strike. This finding is well supported because, as shown above, such economically motivated layoffs are amenable to bargaining. Moreover, just as the Court requested, the Board addressed both of the Company's motives for the layoff, explaining that the Company's economic reasons were distinct from its modernization program, and that the Company failed to prove that its decision to lay off any particular individual was solely based on that program. The Company cannot ignore these findings in order to claim that the Board failed to answer the Court's question on remand.

Yet, the Company makes other arguments that continue to ignore the Board's findings. For example, the Company claims (Br 18) that the Board adopted a "per se" test that failed to consider the Company's motives. However, as just shown, the Board specifically accounted for both of them. Likewise, the Company asserts (Br 21) that the Board ignored its claim that it "transformed" its operations. In fact, the Board considered that and explained that the Company's

economic reasons for the layoffs were separate from any transformation that may have resulted from modernization.[8] (D&O 3, A 44.)

More fundamentally, the Company ignores these findings when it claims (Br 23-24) that the Board's Order places an undue burden on its ability to modernize. To the contrary, the Board did not order the Company to bargain with the Union over its modernization program or layoffs solely attributable to that program.[9] Rather, the Board only required that it bargain over its decision to lay off employees based in part on economic reasons, which reasons, the record showed, were distinct from its modernization.[10] Thus, contrary to the Company (Br 23-24),

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[8] In any event, the record does not establish that the Company's modernization fundamentally changed the scope of its operations. Indeed, the record shows that the Company planned to produce the same agricultural products, in the same locations, and distribute them to the same types of customers. *See NLRB v. Sandpiper Convalescent Center*, 824 F.2d 318, 322 (4th Cir. 1987) (relying on such factors to conclude that the employer's unilateral changes did not involve a change in the scope or direction of the enterprise); *accord FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 790 (6th Cir. 2002); *The Winchell Co.*, 315 NLRB at 526.

[9] The Company also errs in asserting (Br 17, 25) that the Board failed to articulate "any rationale" for requiring it to show that certain layoffs were solely attributable to modernization. To the contrary, the Board explained that where, as here, the General Counsel proves the Company made unilateral changes to the terms and conditions of employment, the employer must prove an exemption to the duty to bargain. *See* cases cited at pp. 13-14, above.

[10] Thus, *Drummond Coal Co., Inc.*, 277 NLRB 1618, 1618-19 (1986), cited by the Company (Br 21), is inapposite. There, the Board found that the employer was under no obligation to bargain about its purely entrepreneurial decision to install new equipment at the mine site.

the approach that the Board adopted here carefully avoids placing any undue burden on the Company's right to shape the direction of its enterprise.

Indeed, the Company's own testimony and arguments before this Court contradict its claim that bargaining over the February 27 layoff decision would impose an undue burden on the Company. Thus, Company President Gonzalez testified (Tr 413), and the Company maintains here (Br 22), that it asked the Union to address its plan to lay off employees. In other words, when these events were unfolding, the Company acted as if bargaining with the Union was beneficial rather than burdensome. Nor is the Company correct in claiming (Br 22) that the Union showed no interest in bargaining over the layoff decision. Rather, the Board found, and this Court did not disagree, that the Company's general statements about potential work force reductions were not sufficiently specific to provide the Union with notice and a reasonable opportunity to bargain over the Company's decision to implement the February 27 layoff. (D&O 2 & n.4, A 43; *see also* A 1.)[11]

[11] In its initial decision, the Board rejected the Company's exception arguing that it had in fact provided the Union with adequate notice of its layoff decision. (D&O 2 & n.4, A 43.) Although the Court remanded the Board's finding that the layoff decision was a mandatory subject, the Court did not disagree with the Board's finding that, if the layoff was a mandatory subject, the Company's notice would be inadequate.

2. The Court should reject the Company's untimely and meritless claim that the Board should have applied a "modification" of the test in *Dubuque Packing*

The Company now claims (Br 19-21), for the first time, that the "better approach" would have been for the Board to take the test for an employer's decision to relocate its corporate facility that it adopted in *Dubuque Packing Co.*, 303 NLRB 386 (1991), *enforced sub nom, UFCW Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), and "modify" it to apply to the multiple-motive layoffs here.[12] There are several fundamental problems with this suggestion.

First, the Company never presented this claim to the Board. In its Statement of Position on remand, the Company did not even cite *Dubuque*, much less urge the Board to apply a modified version of the *Dubuque* test. Accordingly, Section 10(e) of the Act bars this Court from considering that untimely claim now. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the Court . . . .); *Woelke & Romero Framing, Inc. v. NLRB*, 456

[12] *Dubuque* adopted a burden-shifting test for determining whether a plant relocation is a mandatory subject of bargaining. Initially, the Board's General Counsel must show that the relocation was unaccompanied by a basic change in the nature of the employer's operations. If the General Counsel meets that burden, it has established prima facie that the relocation is a mandatory subject. The employer may then rebut that prima facie case by establishing that work performed at the new plant varies significantly from the work at the old plant, or, that the relocation involves a change in the scope and direction of the enterprise. Alternatively, the employer may defend its unilateral relocation by showing that labor costs were not a factor in the decision, or, even if they were, the Union could not have offered any labor-cost concession that could have changed the employer's decision to relocate. *Dubuque*, 1 F.3d at 29-30.

U.S. 645, 666 (1982) ("the Court of Appeals lacks jurisdiction to review" claims that were not raised to the Board); *Edward Street Daycare Center, Inc. v. NLRB*, 189 F.3d 40, 44 (1st Cir. 1999) (the "plain language of [Section 10(e)] evinces an intent that the [Board] shall pass on issues arising under the Act, thereby bringing its expertise to bear on the resolution of those issues").

Second, even if the Court were to consider this argument, it is self-contradictory and without merit. The Company's assertion that the *Dubuque* test has to be "modified" in order to apply here belies its contrary claim that the test is "established" for this case. This conflict is exposed by the Company's puzzling assertion (Br 20) that the Board, in not applying *Dubuque* here, "deviat[ed] from an established standard, susceptible of being modified."[13]

Third, adopting the Company's suggestion would essentially require the Court to order the Board to modify and apply a test that the Board chose not to apply here. Doing so would violate the fundamental principle that the Board, and not the courts, should develop labor policy, and undermine Congress's decision to give the Board broad discretion in this particular area. It is also contrary to the

[13] The Company's position is self-contradictory in another respect. The Company faults the Board (Br 13, 17-18) for "unfairly" applying its analysis in this case retroactively, even though what the Board really did was provide the analysis the Court requested on remand. Yet, the Company, in the same brief (Br 19-21), seeks retroactive application of a modified test that it suggested for the first time after the Board issued its decision on remand.

Court's remand instructions, which did not prescribe any particular analysis, much less the "modification" of a specific test.

Fourth, even if there were some merit to the Company's suggestion, which there is not, the Company cannot prevail merely by offering what it claims is a "better" approach. Rather, it must show that the Board's approach is not "reasonably defensible." *Ford Motor*, 441 U.S. at 497. As shown above, it failed to meet that burden here.

Finally, to the extent that the Company is claiming that the Board had to apply the unmodified *Dubuque* test, that claim also fails. As shown above, the Board reasonably found that the layoff decision here turned on economic considerations that were distinct from any change in the scope of operations that may have resulted from modernization. It is settled that the Board is not required to apply *Dubuque* in these circumstances. *See Regal Cinemas v. NLRB*, 317 F.3d 300, 311-12 (D.C. Cir. 2003) (declining to apply *Dubuque* or *FNM* to decision that turned on labor costs as opposed to change in scope of operations resulting from automation). *See also* R. Gorman, Labor Law: Unionization and Collective Bargaining 690-92 (2004) (noting that while the Board has applied *Dubuque* to relocations, it has declined to apply it to other types of decisions). At any rate, applying *Dubuque* here would not help the Company. Rather, in applying *Dubuque*, the Board has found, with court approval, that an employer was

obligated to bargain over a relocation decision that, like the layoff here, was motivated by both labor costs and increased productivity resulting from the production process. *Vico Products*, 333 F.3d at 206-07.

3. The judge did not find that the layoff was mainly driven by modernization; thus the Board did not ignore or alter any such finding

Next, there is similarly no basis to the Company's suggestion (Br 11, 26, 28) that the judge found that modernization was the "main" reason for the layoff, and that the Board ignored or altered that finding. Rather, the judge found that the Company's staffing needs had been reduced by both modernization *and* "a dip in sales," but did not determine which motive was dominant,[14] or whether the two motives were distinct. (D&O 3 & n.8, A 44.) On remand, the Board found, consistent with the judge's findings, that the layoff was due to a combination of factors, including a dip in sales coinciding with the strike.[15] (D&O 3, A 44.) And,

[14] Thus, while the judge acknowledged Gonzalez's testimony that modernization was "the main reason" for the layoffs, the judge concluded that modernization was *a* reason for the layoffs. Accordingly, this Court noted that the judge found that the layoff decision was based on multiple factors, not that he found that modernization was the main factor. *Pan Am. Grain*, 432 F.3d at 73-74.

[15] The Company (Br 27) faults the Board for calling this an "unfair labor practice" strike, as opposed to an economic strike. However, the Company fails to explain why this distinction matters here. Thus, it does not, and cannot, claim that it would have no duty to bargain over layoffs motivated by a dip in sales that resulted from an *economic* strike. Indeed, the Company does not argue that the economic dispute underlying the strike was not amenable to bargaining.

addressing the issue left open by the judge, the Board reasonably found that this economic component was distinct from the Company's modernization. (*Id.*) It follows that the Company cannot claim, as it does (Br 26-27), that the layoff was "mostly" based on modernization and, thus, *FNM* balancing is mandatory.

Moreover, the Company's reliance on *FNM* is otherwise questionable. The courts have held that the Board is not obligated to apply *FNM*'s balancing test where, as here, it finds that the employer's decision turned on economic reasons that are distinct from any change in the scope of operations. *See Regal Cinemas*, 317 F.3d at 311; *accord FiveCAP, Inc.*, 332 NLRB 943, 955 (2000), *enforced in relevant part*, 294 F.3d 768, 790 (6th Cir. 2002). Further, *FNM* permits the Board to find, as it did here, that the critical factor is whether the employer's decision turned on labor costs. *See Westinghouse Broadcasting*, 489 F.2d at 22-24. And, more fundamentally, *FNM* states that it "intimate[s] no view" as to employer decisions other than partial closures. *See* 452 U.S. at 686 n.22. Thus, as this Court noted here, *Pan Am. Grain*, 432 F.3d at 74, *FNM* does not prescribe a particular formula for addressing dual-motive layoffs like those at issue here. After all, unlike the instant layoff, which was motivated by considerations that are clearly amenable to bargaining (a desire to reduce labor costs in response to a loss of sales and to help employees receive food stamps), the partial closing at issue in *FNM* turned on concerns that were "wholly apart" from the employment relationship and

completely beyond the union's control or authority, namely, a customer's refusal to pay a fee. *FNM*, 452 U.S. at 678, 687.

Finally, contrary to the Company (Br 27), the Board reasonably found that the Company failed to prove that the layoff of any particular individual was *solely* attributable to modernization. The record amply supports the Board's finding. Thus, Company President Gonzalez testified (Tr 415), and the Board found, that the February layoffs were motivated in part by a dip in sales. He also testified (Tr 415-16, 434-35) that the timing of the layoff of 15 employees, all of whom were on strike, was driven by Gonzalez's desire to give them an opportunity to obtain unemployment benefits which, otherwise, would have been unavailable to them as strikers. This further undercuts the claim that those layoffs were solely due to modernization. Moreover, the other testimony cited by the Company (Tr 413-38) merely addresses how modernization impacted certain *job classifications* like "skilled A employees" (Tr 418), and not whether *particular, named employees* were laid off solely due to modernization.

4. The Board did not err in awarding the customary remedy for unilaterally implementing a layoff decision

The Board ordered its customary remedy of reinstatement and back pay for an employer's failure to bargain over a decision to lay off employees. *See Geiger Ready-Mix Co. v. NLRB*, 87 F.3d 1363, 1371 (D.C. Cir. 1996) (approving such a make-whole remedy for failure to bargain over layoff); *NLRB v. Sandpiper*

Convalescent Center, 824 F.2d 318, 324 (4th Cir. 1987) (same). *See also Regal Cinemas*, 317 F.3d at 315 (recognizing reinstatement as the "presumptively valid remedy where the employer violates its duty to bargain"). The Company objects to the remedy based on its view that the layoff resulted from a non-bargainable business decision. (Br 32.)[16] Thus, the Court should enforce the Board's remedy so long as it agrees that the layoff was a mandatory subject of bargaining.[17]

[16] There is no basis to the Company's further claim (Br 34) that the General Counsel failed to argue that the layoff decision was a mandatory subject of bargaining. Rather, the General Counsel has maintained that claim throughout these proceedings.

[17] As Member Schaumber notes, the Company may introduce any previously unavailable evidence at the compliance stage of this proceeding to demonstrate that the reinstatement remedy for the 15 laid-off workers is unduly burdensome because their jobs no longer exist. (D&O 3 n.10, A 44.) Thus, it is unnecessary for the Court to address that issue now, even though the Company raises it in its brief (Br 34-35).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

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NATIONAL LABOR RELATIONS BOARD

August 2008
Pan Am II-finalbrief-mjgl

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Petitioners	*	No. 08-1351
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NATIONAL LABOR RELATIONS BOARD	*	
Respondent	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 7,702 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 14th day of August, 2008

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address listed below:

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Dated at Washington D.C.
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